Petition

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IN THE UNITED STATES SUPREME COURT

October term, 1981

PETITION FOR WRIT OF CERTIORARI
FROM THE TENTH CIRCUIT
COURT OF APPEALS

JAMES ORLANDO QUINTANA, Petitioner,

-vs-

UNITED STATES OF AMERICA, Respondent.

NORMANDO R. PACHECO #5296
Attorney for Petitioner
601 Broadway, Suite 211
Denver, Colorado 80203
(303) 595-9131

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court, in and for the District of Colorado, should have imposed a sanction of dismissal of the indictment or a suppression of evidence because of the loss of eight audio tapes by the United States Government during the investigation of the Quintana conspiracy.

2. Whether the sentence of fifteen years as to Count I - Conspiracy in violation of 21 U.S.C. §846(a)(1) and fifteen years as to Counts III and IV, alleging violations of 21 U.S.C. §841, 18 U.S.C. §2, are excessive wherein in addition to Count IV - Distribution, fifteen years imprisonment and fifteen years special parole and a $25,000.00 fine were imposed.

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PETITION FOR WRIT OF CERTIORARI

COMES NOW the Petitioner, pursuant to Rule 21.1 of the Rules of the Supreme Court.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court, in and for the District of Colorado, should have imposed a sanction of dismissal of the indictment or a suppression of evidence because of the loss of eight audio tapes by the United States government during the investigation of the Quintana conspiracy.

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fifteen years imprisonment and fifteen years special parole and a $25,000.00 fine were imposed.

LIST OF PARTIES

The United States of America, by and through the Office of the United States Attorney was the Plaintiff-Appellee and James Orlando Quintana was a Defendant-Appellant. The parties remained the same before the United States Court of Appeals for the Tenth Circuit.

REFERENCE TO OFFICIAL REPORTS AND OPINION OF THE TENTH CIRCUIT

This Court is referred to Appendix A, in which the United States Court of Appeals for the Tenth Circuit delivered a slip opinion.

JURISDICTION

The date of the judgment sought to be reviewed was rendered February 18, 1982 and subsequent thereto on or about March 1, 1982 the Petitioner filed with the Appellate Court

a Petition for Re-Hearing, the same being denied on or about March 20, 1982.

The statutory provision believed to confer on this Court's jurisdiction is pursuant to Rule 3 and Rule 4 of Federal Appellate Rules of Procedure as well as Rule 17 of the Rules of the Supreme Court;

> "When a Federal Court of Appeals is rendered a decision in conflict with a decision of another Federal Court of Appeals on the same matter".

CONSTITUTION PROVISIONS TREATIES AND STATUTES

The District Court assumed jurisdiction over the Petitioner, James Orlando Quintana pursuant to 21 U.S.C. §846(a)(1); and 21 U.S.C. §841 and 18 U.S.C. §2.

STATEMENT OF THE CASE

The Petitioner appealed to the Tenth Circuit Court of Appeals for the United

States of America, pursuant to Rule 3 and Rule 4 of the Federal Rules of Appellate Procedure from a judgment entered in favor of the Plaintiff-Appellee United States of America in a criminal case as a result of a jury verdict in which the Defendant-Appellant was found guilty of Count I - Conspiracy, Count III and Count IV; Counts III and IV being in violation of 21 U.S.C. §841 and Title 18§2 U.S.C.

This is an appeal from a jury verdict after a trial held before the Honorable Sherman G. Finesilver, United States District Court Judge, in and for the District of Colorado, said judgment being entered on or about November 14, 1980.

The Petitioner Defendant-Appellant was charged in a four Count indictment, alleging conspiracy to distribute a controlled substance, to wit: heroin. The Defendant-Appellant filed numerous motions pertaining

to the admissability of audio-visual tapes and requested a dismissal of the indictment in Criminal Action No. 76-CR-276 for failure of the government to keep in its possession the original audio and visual tapes. The Petitioner's Motion to suppress was denied, a Motion for relief of prejudice as joined between Count I and the remaining three counts was denied and further the Motion to strike overt act was denied. Said Motions were denied on or about September 17, 1980.

On or about November 3, 1980, trial to a jury was commenced on the original four counts and on November 14, 1980 a jury verdict was returned, finding the Defendant Guilty as to Count I and Count IV, Not Guilty as to Count II and guilty as to Count III. On December 8, 1980 the Defendant was

sentenced to a prison term of fifteen years to each of Counts I, III and IV, with the Defendant James Orlando Quintana to pay a fine of $25,000.00 as to Count IV. In addition, Defendant was to have a special parole term of fifteen years and the fine to be stayed until execution, the same being assessed as to Count IV of the indictment.

On December 8, 1980 a Notice of appeal was filed by the Defendant-Appellant in the Tenth Circuit Court of Appeals and the Defendant-Appellant made a bond of $250,000.00.

STATEMENT OF FACT

On May 16, 1976 special agent Michael Vigil of the Drug Enforcement Administration (DEA) Office was transferred from the Albuquerque, New Mexico office to a special assignment in Denver, Colorado and undertook the name of Barney Garcia. On May 16, 1976 Gary Baca, the person identified at the time of trial as a confidential informant,

introduced the agent to a number of people, among whom were; Fidel R. Ramos, Sye Vigil and Anthony Murillo and further inquired as to whether or not these persons were associated with James Quintana. These persons responded in the negative and the record is unequivocal that at no point in time was there any observation of any direct contact between any of the three parties and the Petitioner James Orlando Quintana.

On May 18, 1976 an arranged buy was made in the sum of $1,800.00 for heroin delivered to special agent Vigil by coconspirator Anthony Murillo and Isaac Ruybalid. This meeting was at Sloans Lake, Denver, Colorado and according to surveillance agents who testified, there occurred a meeting between Murillo and Ruybalid. No trans-

action or any conversation was alleged to have been observed or heard between Petitioner Quintana and Murillo and Ruybalid.

On July 20, 1976 agent Vigil again returned to Murillo's apartment in the city and county of Denver to obtain heroin. The agent requested to meet either the Petitioner Quintana or coconspirator Henry Guiterrez and Murillo indicated that he could not make said introduction. At this point a buy was accomplished in which 340 dosage units of heroin were passed between Isaac Ruybalid and agent Vigil.

On August 25, 1976 566 dosage units of heroin were bought by agent Vigil from Isaac Ruybalid after negotiations at the undercover apartment of agent Vigil. On or about August 26, 1976 an additional 856 dosage units were given to agent Vigil by Ruybalid. On September 2, 1976 Ruybalid and agent Vigil met at Notter's Restaurant and according to

tapes introduced, discussed heroin transactions of approximately five ounces at $900.00 per ounce. Further, Ruybalid indicated that he had sold Anthony Murillo five ounces of heroin for $800.00 an ounce on or about July 16 and 17, 1976.

On September 3, 1976 agent Vigil on a pre-arranged signal purchased one ounce of heroin at the price of $900.00 from Isaac Ruybalid.

On September 4, 1976 Ruybalid and Vigil met within the city and county of Denver for purposes of the purchase of 2,228 dosage units of heroin. As to this buy as well as the above-mentioned buys at no time was the Petitioner James Quintana present.

On September 24, 1976 special agent Vigil obtained from Kawano Jewelers in Denver diamonds in order to arrange a buy

between Quintana and Vigil at which time Quintana stated that he would purchase the diamonds for cash but could not arrange a heroin transaction.

On September 28, 1976, government surveillance of both audio and visual nature occured at 1326 Kalamath Street, Denver, Colorado - the home of the parents of the Petitioner James Quintana. On the audio-visual there is a discussion between Ruybalid and Vigil as to purchases of heroin. On that time and date, Quintana reaffirmed his lack of any heroin so as to arrange the transaction as requested by Vigil. On the same date Isaac Ruybalid delivered 364 grams of heroin to agent Vigil. A last attempt was made to purchase two pounds of heroin on October 5, 1976; however, said transaction never took place.

The Petitioner Quintana had requested the District Court to suppress the tape on

the basis of being inaudible and incomplete and further that the originals which were in the possession of the United States government and which had been requested pursuant to Rule 16 of the Federal Rules of Criminal Procedure could not be provided by the United States government. Defendant therefore requested that he be given access to tha tapes in order to compare them to the transcripts which had been provided by the United States government. The Tenth Circuit in its finding of facts upholding the District Court ruling not granting the dismissal ruled at Page 4 of its opinion, in that earlier trial no objections were raised to the accuracy of the transcript itself or the translation of the Spanish words on the tapes. The record would actually indicate as follows:

"THE COURT: And in regard to the editing of the tapes where it has some parenthetical remarks - -

MR. FANNING (U.S. Attorney): I have no objection to that, Your Honor.

THE COURT: You feel you could also agree with counsel as to what could be deleted and also if there are any particular words in Spanish that need an interpretation, that the vehicle of having that translated could be developed also?

MR. FANNING: Yes, Sir. I have no objection to deleting any parenthetical remarks, but there is possibly an underlying problem, I have never discussed with the defense attorneys whether or not they agree to the authenticity of the translation from Spanish to English. The translations were made, Your Honor, by the undercover agent who participated in all the - -

THE COURT: How do you intend to get this to the jury?

MR. FANNING: I plan - - after reviewing the transcripts with the defense attorney and deleting the various parentheticals, I intend to supply the jury with copies of the transcripts of the conversations in Spanish and, at the same time, play the video-tapes and audio recordings that relate to the transcripts, and I would submit probably that would take a period of approximately three and a half hours. I believe there are about twenty video-

tapes involved. Some of the videotapes will not be able to be edited down because they contain extraneous information and pictures - -

THE COURT: But you feel that you and counsel can pretty much delete the extraneous matter?

MR. FANNING: Yes.

THE COURT: But because of the wording and so forth it is your intention to introduce - -

MR. FANNING: Interpretations, Your Honor, because most of the conversations - - I'd say 75% are in the Spanish language, and some of the conversations are in English.

THE COURT: How about the authenticity? Any problem with regard to the accuracy of the translation by the agent?

MR. KEATING (Counsel for co-conspirator, Henry Guiterrez): I think that ultimately we will be able to agree." At the pre-trial hearing it was established that the tapes when last seen were in possession of DEA agents or the United States attorney's office and have been utilized in a trial of a coconspirator. The originals had been misplaced by either the U.S. Attorney's office or by the Drug Enforcement Administration. At the time of trial the tapes

were not produced.

ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

As the record in this case would indicate, Drug Enforcement Administrative agents candidly advised the trial court that the originals had been misplaced either by the U.S. Attorney's office or by the Drug Enforcement Administration.

The Supreme Court's attention is directed to United States v. Bryant, 142 U.S. App. DC 132; United States v. Augenblick, 393 U.S. 348; 80 S. Ct. 528; United States v. Fisher, 324 F. Supp. 429; Brady v. Maryland, 373 U.S. 83; 83 S. Ct. 1194; 10 Led 2d 215, citing Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 Led 2d. 1217; United States v. Miller, 411 F.2d. 1217; United States v. Miller, 411 F.2d. 825(2nd Cir. 1969); Thomas v. United States, 342 F.2d. 49.

As was held in the Fisher case, if the government is in possession and control of the

tapes and for various reasons is either negligent or in the alternative, deliberately destroys the same, fundamental due process requires that the balancing test should have been drawn in favor of the Defendant-Petitioner James Quintana and the tapes and transcripts made therefrom should have been suppressed by Judge Finesilver.

Clearly, as cited above, the agreement to delete extraneous information from said tapes was an agreement between the United States Attorney Joe Fanning and a co-defendant Guiterrez, who was not present at the time of the trial of the Petitioner Quintana. In essence it was an agreement made between two parties above described, and consummated without knowledge or consent of the Petitioner or counsel of record for the Petitioner. On the contrary, the record indicates

that all relevant points and times the Petitioner objected to the introduction of said tapes and transcripts, and that further a defense witness, Harry Hollien indicated that the tapes potentially were nonsynchronized to voices and to actions and lead to the conclusion that the events alleged to be portrayed on the audio-visual portion did not match the transcripts as submitted. It should also be noted that in numerous phrases, the drug enforcement agent Vigil would substitute certain key phrases which had a translation of one area which he inserted a street word for the same type of meaning. As to the inaudible nature of the tapes and examples submitted to this Court of a meeting of September 29, 1976,

> "VIGIL: How many do you have there? Five stones? then for me to sell them, these from the bottom are more than _____.
>
> QUINTANA: I will give 2000 for all of them. That is all I can do.

VIGIL: 25 only?

QUINTANA: I will have to sell them myself.

GUITERREZ: Then they are chipped. That takes a great deal off the value.

QUINTANA: I've got to get the _____ ____ _____.

VIGIL: No, how does that take away the value. They are marked like this.

GUITERREZ: Inaudible. . . they are chipped.

QUINTANA: When they are retail they have a market, a market. They buy it like . . . (inaudible) wholesale. They buy it for about 1500 dollars. The stone like the one you have for 2000 dollars. They buy it for one thousand five hundred wholesale . . . (inaudible) and they sell it for three thousand.

VIGIL: Really.

QUINTANA: And for me to go sell them to those guys, well they don't want to give _____ _____ _____ (inaudible) _____ wholesale like those guys because they know I am taking them below the market.

VIGIL: Yes.

QUINTANA: Then they offer me almost a thousand dollars for each one.

VIGIL: But to lower the prices is not even worth the danger.

GUITERREZ: That one is hard.

QUINTANA: That's all I can do. Turn around, sell them somewhere else.

VIGIL: The thing is. . . if you were to sell it in a jewelry shop, how much would they give you for each one?

QUINTANA: You won't sell it in a shop . . . for three hundred dollars each one. . .

VIGIL: Yeah.

QUINTANA: For this damn one they offered me . . . This one has emeralds, emeralds and the stone cost more. They offered me five hundred dollars.

VIGIL: 500

QUINTANA: You are crazy. Take these few to a jewelry shop so you can see that I am not lying to you.

VIGIL: (Inaudible) Let's go talk over in the car. So how much will you give me for them?

QUINTANA: 2500 dollars.

VIGIL: But the thing is you know like I told Isaac, that I want heroin for them.

QUINTANA: Isaac can fix you up there.

RUYBALID: (Inaudible)

VIGIL: Well then. . . . the thing is (inaudible), well then I'll do the business with you. I'll give you the stones.

RUYBALID: I told you what I want.

QUINTANA: I will give you 2500 hundred dollars.

RUYBALID: I want fourteen grand.

VIGIL: I ain't going to make nothing out of it, man, because with money, no. I ain't going to make nothing out of it man. Not even for the danger that I took, god damn it.

Further in the transcript of Exhibit 32 at page 8 on the same time and date the following conversation took place between Ruybalid and special agent Vigil.

RUYBALID: (Inaudible). . . ten on the stones. What do you want to do. Do you want the fucking heroin or what?

VIGIL: Huh?

RUYBALID: Do you want the heroin or what?

VIGIL: Ask James over there.

RUYBALID: No, I already talked to him. It is between you and me . . . (inaudible).

VIGIL: Ask him how much I am going to make off of that. He's going to make about ten grand.

RUYBALID: No he won't. Don't try to screw with him.

VIGIL: The, that is really bad. He doesn't know I am giving him a break.

RUYBALID: That is the only type of break I can give you.

VIGIL: Ask him.

VIGIL: Deja, hey. I ain't, I ain't giving, I am giving him the breaks bro.

RUYBALID: Let me tell him.

The Petitioner filed the request for suppression of conversations of September 20 and 29, 1976 and of October 5, 1976 and October 6, 1976. The basis for the suppression was that the five tape recordings referred to above were tape recordings of purported conversations between Vigil and neither of the Petitioner or his coconspirators on the dates

referred to above. Based upon review of the transcripts which were in evidence before the trial court, well over 50% of the purported conversations of the above-referenced tapes were either inaudible and/or unintelligible, thereby destroying the integrity of whatever conversations said tapes purported to reproduce as being a true and accurate representation of the conversations as illicited. Because the tapes referred to above are largely inaudible or as the result of a dual transcription, that is the original tape recordings which were unavailable to the Defendant and which were reduced agent Vigil were then given to a secretary for DEA for retyping. Because the tapes are largely inaudible, the remaining fragments of conversation lack context and meaning, and the unintelligible portions are so substantial,

that the tape is untrustworthy for evidentiary purposes and should not have been admitted into evidence in the trial of United States of America v. James Orlando Quintana. The general rule that should have been applied is found in United States v. Lane, 514 Fed.2d. 22 (C.A. 9, 1975) which is that a recorded conversation is generally admissable unless the unintelligible portions are so substantial that the recording as a whole is untrustworthy.

Monroe v. United States, 234 F.2d. 849 at 55 (C.A. D.C., 1956); United States v. Young, 488 F.2d. 1211, 1214 (C.A. 8, 1973); United States v. Jones, 540 F.2d. 465, 470 (C.A. 10, 1976). As it was held in United States v. Frazier, 479 F. 2d. 983, 985 (C.A. 2, 1973):

> "there is an obvious danger when a recording is substantially unintelligible that the part that can be heard can leave a misleading impression of the entire conversation . . the danger of unreliability of partially unintelligible recording is exacerbated by the substantial impact it may have on the jury."

This has also been followed by the Colorado Courts of Appeal in People v. Odneal, 559 P.2d. 230 (1977):

> "50% usable and the other 50% in the gray area was ordered to be suppressed."

Clearly the original tape should have been produced in order to allow the Petitioner inspection, either by counsel or through retained experts in order to determine the fairness and accuracy of the transcripts of the original tapes.

In essence, by the negligence or conscious efforts of the United States government, the government failed to preserve evidence, which based on the transcripts which have been provided and referred to above, contained exculpatory information within them, which could have lead the jury to draw its attention to the fact that such exculpatory information was contained

in the originals. It has been held in United States v. Buchanan, 585 F.2d.100 (C.A. 5, 1978) that traditionally it deals with due process of law guaranteed by the Fourteenth Amendment have recognized the Defendant's right to indpendently inspect and analyze important tangible evidence which the government sought to utilize against the Defendant-Appellant. United States vs. Dildly, 39 F.R.D. 340 (1966); United States v. Kaminsky, 275 F. Supp. 365 (1967).

It is the Petitioner's contention that the ruling of the Tenth Circuit allowing the introduction of the tapes was in conflict with United States v. Carson, 464 F.2d. 424 409 U.S. 949, 93 S. Ct. 268, 34 Led 2d 219; United States v. Skillman, 442 F.2d. 542 (Ninth Circuit, 1971); United States v. Carlson, 423 F.2d 431 (9th Cir. 1979) cert. denied; 400 U.S. 847, 91 S. Ct. 94, 27 Led 2d

84.

Because of the conflict in decisions within the Tenth Circuit Court of Appeals rendering its own decisions as well as conflict in decisions of the other circuits as enumerated above. It is clear that the Supreme Court should exercise its supervisory power in order to align these decisions to come up with an applicable rule of law which will govern similar situations in the future.

It is clear that if the ruling of the Tenth Circuit is allowed to be upheld, it will then mean that the prosecution allow the Defendant in a criminal case to retain possession of evidence in order to insure that it is not lost or destroyed, wherein the alternative that orders must be enforced by the Court to prevent said loss

and to insure no bad faith or negligence by government in preservation of evidence.

WHEREFORE it is respectfully requested that the United States Supreme Court grant the Petition for Writ of Certiorari and allow a brief to be filed on behalf of the Petitioner James Orlando Quintana, or for such other and further relief as the Court deems just and proper under the circumstances.

Respectfully submitted this 14th day of May, 1982.

NORMANDO R. PACHECO #5296
Attorney for Petitioner
601 Broadway, Suite 211
Denver, Colorado 80203
Telephone: (303) 595-9131

CERTIFICATE OF MAILING

I hereby certify that on the 14th day of May, 1982, I deposited in the United States Mails, in a securely sealed postage prepaid envelope a true and correct copy of the foregoing Petition for Writ of Certiorari to:

United States Attorney's Office
Room C-330 United States Courthouse
1929 Stout Street
Denver, Colorado 80294

Solicitor General
Department of Justice
Washington, D.C. 20530

Appendix

APPENDIX A

Copies of opinions of the United States Court of Appeals, February 18, 1982.

APPENDIX B

Petition for Re-Hearing, March 20, 1982.

2-18-82 80-2042 - 80-2320

United States Court of Appeals

For the Tenth Circuit

SLIP OPINION APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
FEB 18 1982
HOWARD K. PHILLIPS
Clerk

UNITED STATES OF AMERICA	)	
	)	
Plaintiff-Appellee	)	
	)	
v.	)	NOS. 80-2042, 80-2320
	)	
JAMES ORLANDO QUINTANA	)	
	)	
Defendant-Appellant	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. Case No. 76-CR-276)

Brian G. McConaty, Assistant U.S. Attorney, Denver (Joseph Dolan, United States Attorney, Denver, with him on the brief), for Plaintiff-Appellee.

Normando R. Pacheco, Denver, for Defendant-Appellant

Before: SETH, Chief Judge, McWILLIAMS, Circuit Judge, and PECK, Senior Circuit Judge*.

PECK, Senior Circuit Judge

In these consolidated cases, James Quintana appeals, first, from the district court's refusal to dismiss the indictment against him, and second from a judgment of conviction following a jury trial. Quintana argues on appeal that the district court exceeded its statutory authority or abused its discretion in sentencing him. He also sees reversible error in several of the

*Of the United States Court of Appeals, Sixth Circuit, sitting by designation.

district court's pretrial and evidentiary rulings.

The first sentencing issue is whether the trial judge imposed a special parole term without statutory authority. To follow this argument, it is necessary to align the charges, convictions and sentences. Quintana was charged with one count of conspiracy to distribute heroin (Count I, 21 U.S.C. § 846(a)(1)), and with three counts of distributing heroin (Counts II - IV, 21 U.S.C. § 841, 18 U.S.C. § 2). The jury found Quintana guilty on all counts but the second. The trial judge imposed the following sentences, all concurrent:

Count I (Conspiracy)	15 years imprisonment
Count III (Distribution)	15 years imprisonment + 15 years special parole
Count IV (Distribution)	15 years imprisonment + 15 years special parole + $25,000 fine.

Quintana argues that the special parole terms are unlawful under Bifulco v. United States, 447 U.S. 381 (1980). Bifulco held that 21 U.S.C. § 846,[1/] the conspiracy statute pertinent here, does not authorize the imposition of a special parole term, even if special parole is among the sanctions authorized for the target offense of the conspiracy. Id. at 447 U.S. 387-401.

The trial court would have erred had it imposed a special parole term as part of the sentence under Count I. It did not, but rather imposed special parole only for the violations of 18 U.S.C.

[1/] This section provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. 21 U.S.C. § 846 (emphasis added).

§ 841(a)(1) charged in Counts III and IV. Under this section, special parole is not only an allowable sentence, but a mandatory one for distribution of heroin. See 21 U.S.C. §§ 841(b)(1)(A), 812(c).

Quintana's next contention is that the district court abused its discretion in sentencing Quintana to prison terms three times longer than those imposed on separately tried coconspirators. In sentencing Quintana, the district court noted that the testimony showed that Quintana was "somewhat of a central figure in the distribution of drugs" who had been found guilty on three counts in a case involving substantial amounts of drugs.[2/] Neither Quintana nor his trial counsel chose to make any statement explaining or mitigating Quintana's crimes. Quintana had prior convictions in state court. There was no abuse of discretion in sentencing Quintana.

Quintana next argues that the district court should have imposed the sanction of dismissal of the indictment or of suppression of evidence because of the government's loss of eight audio tapes produced during the investigation of the Quintana conspiracy. The whereabouts of these tapes was last known in 1977, when they were introduced into evidence at the trial of one of Quintana's coconspirators. The disappearance of the tapes, which recorded conversations between coconspirators (including Quintana) and a government undercover agent, was a subject of a pretrial hearing, following which the district court found that no government bad faith or even negligence caused the loss of this evidence. The trial court further found that an accurate transcript of the tapes was

---

[2/] There was testimony at trial of discussions of the sale of pounds of heroin.

available from the record of the earlier trial, and that in that earlier trial no objections were raised to the accuracy of the transcript itself or to translations of Spanish words on the tapes. Government agents testified "without refutation" at the pretrial hearing in the present case that their transcriptions of the tapes were accurate. Quintana produced no contrary evidence, even though persons with knowledge of the conversations recorded on the tapes were available to the defense.

In arguing the necessity of dismissing his case or suppressing the transcripts of the tapes, Quintana relies chiefly on Brady v. Maryland, 373 U.S. 83 (1963), and cases following it. Brady held that due process precluded the government's suppression of evidence requested by defendants in discovery, "where the evidence is material either to guilt or punishment. . . ." Id. at 373 U.S. 87. Under Brady, the good or bad faith of government agents is irrelevant. Id. Cases after Brady, however, have distinguished the "suppression" and "loss" of evidence, and in cases of loss have applied a "pragmatic balancing test" to decide whether sanctions should be imposed on the government for losing evidence. See, e.g., United States v. Grammatikos, 633 F.2d 1013, 1019-22 (2d Cir. 1980); United States v. Arra, 630 F.2d 836, 849 (1st Cir. 1980); United States v. Rose, 590 F.2d 232, 237 (7th Cir. 1978), cert. denied, 442 U.S. 929 (1979); United States v. Miranda, 526 F.2d 1319, 1327-28 (2d Cir. 1975), cert. denied, 429 U.S. 821 (1976).

Under this balancing test, the prejudice to defendants from loss of evidence, and the government's culpability in losing it, are weighed against the government's interests in prosecuting crime. Here the trial court found that the government was not at

all culpable in losing the tapes. The prejudice to Quintana from that loss is to an extent unknowable: Quintana argues that portions of the taped conversations transcribed as "inaudible" might have been technically enhanced to yield exculpatory statements by him. The tapes are gone. There is no way of testing Quintana's assertions.

There is, on the other hand, no evidence that government agents selectively transcribed the tapes. Some disclaimers by Quintana of any part of heroin trade are in the transcriptions. Moreover, even though some of the conversations on the missing audio tapes were also recorded on video tapes available to the defendant, he did not point out to the district court any flaws in the transcription of these conversations. At least in those cases where no government culpability has been established, a defendant must show a greater likelihood of prejudice from the loss of evidence than Quintana has done, if sanctions against the government are to be invoked successfully. See Arra, supra, at 630 F.2d 849, and cases cited there. There was no reversible error in the district court's refusal to dismiss the indictment of Quintana, nor in its refusal to suppress the transcript of the missing tapes.

We have carefully considered Quintana's other arguments and references and hold that he has not established any abuse of discretion by the district court. That court's judgment is therefore affirmed.

NOS. 80-2042, 80-2320

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARCH TERM- March 30, 1982

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ORDER
	)	
JAMES ORLANDO QUINTANA,	)	
	)	
Defendant-Appellant.	)	

BEFORE: SETH, Chief Judge, McWILLIAMS, Circuit Judge, and PECK, Senior Circuit Judge*.

Upon consideration of the petition for rehearing filed herein by defendant-appellant, the court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT

Howard K. Phillips, Clerk

*Of the United States Court of Appeals, Sixth Circuit, sitting by designation.

APPENDIX B